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Proposed Attorneys for Debtor and  
Debtor-in-Possession

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF OREGON

In re	)	Case No. 08-33007-rld11
TRINITY CARPET BROKERS, INC., an	)	
Oregon corporation,	)	MOTION FOR FIRST DAY ORDER
	)	AUTHORIZING: (1) DEBTOR TO PAY
Debtor.	)	PRE-PETITION WAGES, SALARIES,
	)	COMMISSIONS AND EMPLOYEE
	)	EXPENSES, ACCRUED EMPLOYEE
	)	SICK PAY, VACATION PAY AND
	)	BENEFITS, EMPLOYMENT TAXES,
	)	AND PREPETITION INDEPENDENT
	)	CONTRACTOR INVOICES; AND
	)	(2) DEBTOR TO HONOR CUSTOMER
	)	DEPOSITS

Trinity Carpet Brokers, Inc., an Oregon corporation (the "Debtor"), moves this Court pursuant to 11 USC §§ 105(a) and 503(b) for a "first day" order as follows.

1. On June 20, 2008 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11, United States Bankruptcy Code (the "Code"). The Debtor continues in possession of its property and management of its operations as debtor-in-possession in accordance with Sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested or appointed.

2. This Court has jurisdiction over this case under 28 USC §§ 157 and 1334.

Venue of this case is properly in this district under 28 USC §§ 1408 and 1409. This matter is a core proceeding under 28 USC § 157(b) of the Bankruptcy Code.

3. The Debtor is an Oregon corporation incorporated in 1994 with a current sales volume of approximately \$28 million per year. The Debtor is a large, full service flooring and design center that serves builders, remodeling contractors, property management companies, and home owners in the Pacific Northwest. Declaration of John Chism ("Chism Declaration"), ¶ 9. The Debtor currently employs approximately 45 employees. The Debtor also uses independent contractor carpet installers to install carpets for the Debtor's customers. The subcontractor carpet installers are generally self employed individuals and it is the industry practice for installers to be independent contractors rather than employees. The debtor has no captive employee installers. Chism Declaration, ¶ 10.

4. This case contemplates an early sale ("Sale") of most of Debtor's assets to a third party, SC Design of San Diego, California ("SC"). Sterling Bank ("Sterling") is Debtor's primary secured lender with first priority collateral interests as set forth in Debtor's accompanying *Motion For Order (1) Authorizing Debtor's Use Of Cash Collateral, (2) Granting Adequate Protection, and (3) Setting Final Hearing*. Unfortunately, it is anticipated that the proceeds from the Sale will likely yield far less than the amount of Sterling's secured claim. Nonetheless, to facilitate the sale under 11 USC § 363, Sterling has agreed to fund certain aspects of this case from its cash collateral, including payments needed for Debtor to run its business operations through the date of sale. See Chism Declaration, ¶ 11.

5. By this Motion, Debtor requests leave to pay up to the applicable priority allowance under 11 USC § 507, the Wages, Taxes and Benefits, Commissions, Expenses, Sick and Vacation claims, and Independent Contractor Claims all as defined herein. The amounts to be paid are set forth in the approved cash collateral budget

1 filed as part of the *Motion For Order (1) Authorizing Debtor's Use Of Cash Collateral, (2)*  
 2 *Granting Adequate Protection, and (3) Setting Final Hearing.*

### 3 **WAGE AND COMMISSION CLAIMS, RELATED TAXES**

4 6. The Debtor generally pays its employees (both salaried and hourly) twice  
 5 per month. Payroll taxes ("Taxes") and benefits ("Benefits") are typically paid at the  
 6 same time as the corresponding paycheck. On June 19, 2008, hourly and salaried  
 7 employees were paid for all Wages and Benefits due and owing through the prepetition  
 8 pay period ending June 15, 2008, as were the applicable Taxes. The next regularly  
 9 scheduled pay day is July 5, 2008, for the pay period from June 16, 2008, through  
 10 June 30, 2008. As of the Petition Date, the total amount of prepetition Wages and  
 11 Benefits for the period from June 16, 2008, to June 20, 2008, that is owed to hourly and  
 12 salaried employees and will become due on July 5, 2008, is approximately \$69,700  
 13 ("Wages"). Chism Declaration, ¶ 12.

14 7. Commissionable employees are entitled to commissions once per month.  
 15 Commissions are paid for sales completed in previous months and also paid in full by  
 16 the 15<sup>th</sup> of the current month. Each commission payment is reduced by the amount of  
 17 any draws previously taken by the employee. All commissionable employees were paid  
 18 their due and payable commissions on June 19, 2008. As of June 20, 2008, the  
 19 estimated amount of prepetition commissions accrued but not yet due is \$28,000  
 20 ("Commissions"). Chism Declaration, ¶ 13.

### 21 **SICK AND VACATION CLAIMS**

22 8. Employees are entitled to receive credit for accrued sick time and vacation  
 23 time ("Sick and Vacation"). The Debtor seeks authority to continue honoring that policy.  
 24 In the event any employee quits prior to the Petition Date, the Debtor also seeks  
 25 authority to pay any accrued vacation pay to such employees, consistent with Debtor's  
 26 existing policies. Chism Declaration, ¶ 15.

1           9.     Upon information and belief, no employee is owed more than \$10,950 for  
 2     Wages and Sick and Vacation claims. Chism Declaration, ¶ 16. See 11 USC  
 3     § 503(a)(4).

#### 4                               **EXPENSE REIMBURSEMENT CLAIMS**

5           10.    Hourly and salaried employees are entitled to receive expense  
 6     reimbursements as soon as reasonably possible after submission of approved  
 7     expenses to the Debtor's accounting department. As of June 20, the Debtor is unaware  
 8     of any expenses owing to any employees, but is uncertain whether in fact any  
 9     prepetition expense reimbursement may in fact exist ("Expenses"). Chism Declaration,  
 10    ¶ 14.

#### 11                           **INDEPENDENT CONTRACTOR CLAIMS**

12          11.    It is generally the case in Debtor's industry that carpet installers are  
 13     retained by carpet contractors as independent contractors. Notwithstanding, Debtor's  
 14     independent carpet installers generally have a longstanding relationship with Debtor  
 15     and materially contribute to Debtor's operations such that their unwillingness to  
 16     cooperate with Debtor's postpetition business could materially and adversely affect its  
 17     ability to complete existing projects and obtain new ones. The Debtor has no captive  
 18     employee installers. Chism Declaration, ¶ 18. On June 19, 2008, the Debtor's carpet  
 19     installers were paid for invoices submitted for work completed through June 13, 2008.  
 20     The Debtor expects to receive invoices for work performed by carpet installers during  
 21     the work week ending June 20, 2008, on or around June 23 and 24, 2008. The total  
 22     amount of unpaid for outstanding independent contractor work that has yet to be  
 23     invoiced is estimated to be approximately \$130,000.00 ("Independent Contractor  
 24     Claims"). Chism Declaration, ¶ 17.

25          12.    The payment of Independent Contractor Claims is necessary to the  
 26     continued operation of the Debtor for the reason that if such payments were not made,

the Debtor cannot continue to install carpets purchased by its customers, such that the Debtor may not be able to continue to operate. Additionally, if the independent contract carpet installers are not paid, they may be able to assert construction lien rights against property owned by the Debtor's customers, creating more expenses for the Debtor and putting the Debtor's expected profits from those customers at risk. Chism Declaration, ¶ 20.

### **PRIORITY CASH DEPOSITS**

13. Additionally, the Debtor receives cash deposits from its customers, that it applies to the cost of furnishing materials and labor for installation of the carpet sold to the customers. As of the Petition Date, the Debtor has approximately \$274,000 in cash deposits from its customers ("Cash Deposit Claims"). In the aggregate, the Debtor anticipates profiting from performing under its contracts with its customers with Cash Deposit Claims so long as the Cash Deposit Claims are honored in full. Accordingly, it is in the best interest of the Debtor and its creditors to allow the Debtor to fully honor the cash deposits of its customers and complete the projects to which the cash deposits apply. Chism Declaration, ¶ 19.

### **CERTAIN PAYMENTS MADE PREPETITION**

14. The payment of prepetition Wages, Commissions, Sick and Vacation, Expenses and Independent Contractor Claims (collectively, the "Obligations"), are necessary to the continued operation of the Debtor and will make Debtor's retention of its employees and contractors more likely. Chism Declaration, ¶ 32.

15. Pursuant to § 105(a) of the Bankruptcy Code, courts have consistently permitted immediate payment of prepetition obligations where necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors, specifically including payment of the prepetition claims of employees. See *In re Ionosphere Clubs, Inc.*, 98 BR 174, 175-77 (Bankr SDNY 1989) (authorizing payment of prepetition wages,

1 salaries, reimbursable business expenses and health benefits); see also *In re Gulf Air,*  
 2 *Inc.*, 112 BR 152, 153-54 (Bankr WD La 1989). Moreover, courts have allowed  
 3 immediate payment of certain prepetition obligations under the “necessity of payment  
 4 doctrine.” See *In re Ionosphere Clubs*, 98 BR at 176. But see, *B&W Enters., Inc. v.*  
 5 *Goodman Oil Co. (In re B&W Enters., Inc.)*, 713 F2d 534, 537 (9<sup>th</sup> Cir 1983) (declining  
 6 to apply the necessity of payment doctrine beyond the context of a railroad organization  
 7 where the debtor made postpetition payments to certain trade creditors on account of  
 8 their prepetition debts without first obtaining bankruptcy court approval).

9 16. Payment of the Obligations is essential if the Debtor is to complete the  
 10 Sale. Moreover, such payments are necessary in order to ameliorate in a small but  
 11 important measure the troubles that the employees and contractors face as a result of  
 12 the Debtor’s financial difficulties.

13 17. Should the Court approve the cash collateral motion, the Debtor will have  
 14 sufficient cash to pay all Obligations from cash collateral.

15 18. Certain of the Obligations which the Debtor requests authority to pay are  
 16 entitled to priority under § 507(a)(4) of the Bankruptcy Code. Section 507(a)(4)  
 17 provides that each employee may be granted a priority claim for “allowed unsecured  
 18 claims, but only to the extent of \$10,950 for each individual... earned within 90 days  
 19 before the date of the filing of the petition... for wages, salaries, or commissions...”  
 20 11 USC § 507(a)(4). Because the Obligations were earned within ninety (90) days of  
 21 the commencement of the Debtor’s bankruptcy case, employees’ claims for payment of  
 22 such amounts are entitled to priority pursuant to § 507(a)(4).

23 19. Notice of this Motion has been served by ECF, facsimile, or overnight  
 24 courier to (i) the United States Trustee, (ii) each of the Debtors’ secured creditors or  
 25 their counsel (Sterling Savings Bank), (iii) Mohawk; (iv) Shaw; and (v) the 20 largest  
 26 unsecured trade creditors included on the list filed pursuant to BR 1007(d). In light of

1 the emergency nature of the relief requested herein, the Debtor submits that no other or  
2 further notice is required in these circumstances.

3 WHEREFORE, the Debtor respectfully requests entry of the Order granting the  
4 relief sought herein and such other and further relief as the Court may deem proper.

5 Dated this 20<sup>th</sup> Day of June, 2008.

6 SUSSMAN SHANK LLP

7 */s/ Barry P. Caplan*

8 By \_\_\_\_\_

9 Barry P. Caplan, OSB No. 65017  
10 Martin P. Meyers, OSB No. 99082  
11 Proposed Attorneys for Debtor and  
12 Debtor-in-Possession  
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CERTIFICATE OF SERVICE

I, Cynthia A. Tolle, declare as follows:

I am employed in the County of Multnomah, State of Oregon; I am over the age of eighteen years and am not a party to this action; my business address is 1000 SW Broadway, Suite 1400, Portland, Oregon 97205-3089, in said County and State.

I certify that on June 20, 2008, I served, a full and correct copy of the foregoing **Document** to the parties of record, addressed as follows:

**See attached Service List.**

I also certify that on June 20, 2008, I determined from the United States Bankruptcy Court for the District of Oregon's electronic case filing system that the following parties will be served electronically via ECF:

**See attached Service List.**

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: June 20, 2008.

*/s/ Cynthia A. Tolle*

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Cynthia A. Tolle, Legal Assistant

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## SERVICE LIST

### VIA ECF

U.S. Trustee, Portland  
ustpreion18.pl.ecf@usdoj.gov

### 20 LARGEST UNSECURED CREDITORS

#### VIA FACSIMILE

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Brightway Construction  
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Cascade Pacific Inc.  
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Portland, OR 97202  
Telephone: 503-233-9663  
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866-873-2875 (Dixie Home)  
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Flexible Foam Products Inc.  
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Metropolitan Hardwood Floors  
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Mohawk Carpet Corporation  
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Seapac  
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David Foraker, Attorney for Sterling Savings Bank  
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Sterling Savings Bank  
c/o Jim Robb  
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Facsimile: 509-458-2384

Sterling Savings Bank  
Attn: Heidi Stanley, Pres. & CEO  
111 N Wall  
Spokane, WA 99201-0696  
Facsimile: 509-368-2042

**Also sent via Certified Mail, Return Receipt Requested** on June 21, 2008

Sterling Savings Bank  
Attn: CT Corporation Systems, Inc., Its registered agent  
388 State St, Ste 420  
Salem, OR 97301  
(Does not accept Fax service)  
And also sent via Certified Mail, Return Receipt Requested by June 21, 2008

David Banker, attorney for Mohawk Carpet  
Lowenstein & Sandler  
1251 Avenue of Americas 18<sup>th</sup> Floor  
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Facsimile: 212-262-7402

Shaw Industries, Inc.  
c/o Doug Barta  
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Chicago, IL 60693  
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Facsimile: 706-428-8512

T&A Supply Co.  
c/o Laurie Carlson  
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Kent, WA 98035-0927  
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Trinity Partners LLC  
c/o John Chism  
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**ALSO NOTIFY:**

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